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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

F.B., **Petitioner,** **v.** **THE SUPERIOR COURT OF CONTRA COSTA COUNTY,** **Respondent;** **CONTRA COSTA COUNTY CHILDREN & FAMILY SERVIES BUREAU et al.,** **Real Parties in Interest.**	**A127757** **(Contra Costa County Super. Ct. No. J0801088, J0801089, J0801090)**

Petitioner F.B. (mother) seeks extraordinary writ relief from a juvenile court order setting a permanency planning hearing for three of her four children. (Cal. Rules of Ct., rule 8.452; Welf. & Inst. Code, § 366.26.)[1] She contends the order must be reversed because it was predicated on hearsay statements made by her four-year-old daughter, whom the court found incompetent to testify as a witness at the hearing. We deny the petition.

[1] Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

BACKGROUND

Mother has four children: 12-year-old J.B., four-year-old C.B., three-year-old G.M. and the two-year-old A.M. Gerardo M. is the father of G.M. and A.M. and was living with mother when A.M. was born. A.M. and mother both tested positive for cocaine at his birth. Mr. M. was physically abusive to mother when he drank alcohol, and J.B. witnessed some of the abuse.

Real party in interest the Contra Costa County Bureau of Children and Family Services (Bureau) filed a petition to declare the children dependents of the juvenile court under section 300. The children were removed from mother's custody and placed in foster care after mother admitted allegations that (1) her substance abuse impaired her ability to adequately parent a child, and (2) she had engaged in episodes of domestic violence with Mr. M. (§§ 300, subd. (b), 361.) Mother was given a reunification plan targeting these issues, which included components of visitation, drug treatment and testing, domestic violence counseling and parenting classes. After his paternity was confirmed, Mr. M. was given a plan as to his children G.M. and A.M. and was allowed some visitation with C.B., who viewed him as her father.

During the initial six-month period of reunification services, mother complied with her plan and made good progress overall. Concerns arose when the Bureau learned that she might have allowed Mr. M. to have contact with the children during her visits, despite his having only supervised visitation rights and despite an order that he have no contact with J.B. C.B., who was then three years old, had told the Bureau social worker assigned to the case that "Papi" (her word for Mr. M.) was present at a visit. When questioned by the social worker about Mr. M.'s presence, J.B. replied that "his mother knew [Mr. M.] was not supposed to be there, so why would she allow him to be there?" Mother initially denied that she had allowed Mr. M. to join her on visits with the children, but ultimately admitted that she had lied and that Mr. M. had been present.

At the six-month review hearing (§ 366.21, subd. (e)), the court continued the children in out-of home placement and ordered that mother and Mr. M. receive an additional six months of reunification services. Mother continued to make progress, and

at the 12-month review hearing, the court extended her reunification plan for another six months after finding it reasonably probable that the children would be returned home within this period. (§ 366.21, subds. (f), (g)(1).) Reunification services were terminated as to Mr. M.

In the social study prepared for the 18-month review hearing (§ 366.22), the Bureau recommended that all four children be returned to mother's custody subject to continuing juvenile court supervision. The Bureau then filed an amendment to the social study recommending instead that the court return J.B. to his mother's care and set a permanency planning hearing under section 366.26 as to the three youngest children. The reason for the change in recommendation was that mother "had allowed [Mr. M.] to see the children and that he spent the night repeatedly in her home while the children were present." This allegation was based on statements made by C.B. to her foster father and social workers that Mr. M. had spent the night in mother's home during an extended visit by the children.

At the contested 18-month review hearing, C.B. was called as a witness at mother's request so that she could be cross-examined about these statements. The court determined C.B. was not competent to testify because she failed to respond to a number of questions posed by counsel in chambers and it could not be ascertained whether she understood the difference between the truth and a lie. Mother objected to the court's consideration of any out-of-court statements by C.B. concerning Mr. M.'s presence in mother's apartment as unreliable hearsay. The court overruled the objection.

The social worker assigned to the case testified that mother was given unsupervised visitation and the children were allowed to spend the Christmas holidays with her. After the holidays, C.B. reported to her foster father that "Papi" had visited mother's house while the children were visiting. The social worker personally interviewed C.B., who told her that Mr. M. had been in her mother's home.

The court also heard testimony from a social worker/investigator who had interviewed C.B. at the Bureau's request. C.B. told the investigator that "Mr. Gerardo M." had been in mother's home during her visit and had slept on the floor.

C.B. explained that Mr. M. was her younger brother's father and that he was not allowed to sleep in the bedroom. According to C.B., he would hide in the closet when people came to the door and no one was allowed inside when he was there. C.B. drew a picture of her family for the investigator that included a picture of Mr. M. She was not able to say exactly when the visit occurred.

Mother took the stand and testified that she had not allowed Mr. M. into her home while the children were visiting. She explained that her family friend Juan R., who lived with her brothers, had spent a night on her living room floor, and that C.B. confuses Mr. M. and Mr. R. Mother had last seen Mr. M. about a week before the hearing, when he came to her house unannounced and she called the police who arrested him. J.B. was also called as a witness and claimed he had not seen Mr. M. in his mother's home during the holiday visit, although Juan R. had slept on the floor one night.

At the conclusion of the hearing, the court ordered that J.B. would be returned to his mother's care. It found that mother continued to pose a risk of harm to the three youngest children; consequently, it terminated reunification services and set a permanency planning hearing under section 366.26 for C.B., G.M. and A.M.. The court explicitly credited C.B.'s out-of-court statements that Mr. M. had been in mother's apartment during the holiday visit. It noted that C.B. lacked a motive to lie, had told the same story to three different individuals, and had been very specific in describing what Mr. M. did when he was at the apartment. The court further found that mother and J.B. had been untruthful when they testified that Juan R. was the person who had slept on the floor, noting that both of them had lied about Mr. M.'s previous unauthorized visits when they had been brought to the social worker's attention in March 2009, before the six-month review hearing. The court concluded that mother could not be trusted to tell the truth or to protect her younger children.

DISCUSSION

The order setting the case for a permanency planning hearing rested on C.B.'s out-of-court statements that Mr. M. had visited mother's home while the children were present. Mother argues that the court violated her right to due process when it considered

these statements notwithstanding its determination that C.B. was incompetent to testify at the 18-month hearing. She complains that because she was unable to cross-examine C.B. about her statements, they were insufficient to support the court's determination that she continued to pose a risk of harm to her children. We disagree.

C.B.'s out-of-court statements were offered for the truth of the matter asserted and would be inadmissible hearsay in an ordinary civil case. (See Evid. Code, §§ 1200, subds. (a) & (b), 1201.) In dependency cases, however, the rules of evidence are relaxed and hearsay evidence that would otherwise be inadmissible may be considered when making determinations regarding the child's custody and placement. (See *In re Lesly G.* (2008) 162 Cal.App.4th 904, 914-915; *In re Vincent G.* (2008) 162 Cal.App.4th 238, 243.) Though parents have the right to be heard in a meaningful manner, due process "is a flexible concept which depends upon the circumstances and a balancing of various factors" and "is not synonymous with full-fledged cross-examination rights." (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.)

In a situation analogous to the one before us, our Supreme Court has held that a jurisdictional finding in a dependency case may be based on the hearsay statements of a child who is the subject of the proceeding, even when that child has been disqualified as a witness at the hearing itself due to her inability to distinguish between truth and falsehood. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1248 (*Lucero L.*).) Interpreting a statutory provision that permits a jurisdictional finding to be based on the hearsay statement of a child under 12 who is the subject of the dependency petition (§ 355, subd. (c)(1)(B)), *Lucero L.* concluded that a parent's right to due process would not be violated so long as " 'the time, content and circumstances of the statement provide sufficient indicia of reliability.' " (*Lucero L.*, at p. 1248.)

Although we are concerned here with a hearsay statement introduced through testimony at the 18-month review hearing rather than hearsay contained in the social study for the initial jurisdictional hearing, the reasoning of *Lucero L.* applies to the situation before us with equal if not greater force. This is because *Lucero L.* was

concerned with hearsay evidence introduced at the jurisdictional hearing, where the evidentiary rules are stricter than they are at subsequent review hearings.

A jurisdictional finding in a dependency case must, in general, be based on evidence that would be admissible in an ordinary civil proceeding, subject to an additional hearsay exception for information contained in the social study. (§§ 355, subds. (a) & (b), 701.) Even the court's consideration of the social study is conditioned on certain rights of cross-examination. (See § 355, subds. (b)(2) [preparer of social study must be available for cross-examination] & (c)(1) [hearsay statements insufficient to support jurisdictional finding, subject to certain exceptions].)

The statutes governing post-jurisdictional hearings do not similarly require the general application of the ordinary rules of evidence. (§§ 358 [dispositional hearing]; § 366.21 [six-month and 12-month review hearings]; 366.22 [18-month review hearing].) And, once jurisdiction has been established, the court's consideration of hearsay reports is no longer explicitly conditioned on the availability of the author for cross-examination. (*Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1387, fn. 3; *In re Corey A.* (1991) 227 Cal.App.3d 339, 346-347; *In re Tasman B.* (1989) 210 Cal.App.3d 927, 932; § 358 [court shall "receive in evidence the social study" at the disposition hearing, with no provision for cross-examination of preparer of report or hearsay declarants]; § 366.22, subd. (a) ["court shall review and consider the social worker's report and recommendations," with no provision for cross-examination of preparer of report or hearsay declarants].)

If due process would not be violated by the admission of a child's hearsay statement in a social study at the jurisdictional hearing, as the court held in *Lucero L.*, we cannot say it would be violated by allowing similar evidence at the 18-month review hearing, at which the evidentiary rules are more relaxed. We conclude that the reasoning of *Lucero L.* applies to the situation before us and that the hearsay statements of a child who is later declared incompetent as a witness may support a juvenile court's decision to terminate reunification services and set the case for a permanency planning hearing so

long as the juvenile court finds the hearsay statement bears a sufficient indicia of reliability. (*Lucero L.*, *supra*, 22 Cal.4th at p. 1248.)[2]

The juvenile court in this case explicitly found that C.B.'s statements bore the necessary indicia of reliability, a finding we must uphold so long as it is supported by substantial evidence. (*Lucero L.*, *supra*, 22 Cal.4th at p. 1249.) In conducting our review, we must resolve all conflicts in the evidence in favor of the prevailing party and indulge in all legitimate inferences to uphold the court's order, if possible. (See *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820, 2 Cal.Rptr.2d 429.) The substantial evidence standard is readily satisfied in this case.

As the court explained: "First of all, [C.B.] has told three separate people the same story. She has been absolutely consistent in this. I absolutely believe we have it tied down because [the social worker] said she was discussing with her the last Christmas visit. So I'm quite clear that we're discussing the Christmas visit. [¶] She describe[d] in particular things about that visit and things that Mother says. She's very specific. She also says he was sleeping on the floor. Of course other people come up with 'well, somebody else was sleeping on the floor.' It was quite hard for the court to believe this other person was sleeping on the floor when he lives a couple [of] blocks away with the brothers. Why on earth is he sleeping on the floor when he lives with the brothers a couple of blocks away? That doesn't seem very logical. Why would he be sleeping there? [¶] "But for [Mr. M.] she was quite specific in her testimony – I mean in her statements to people that the minor said her mother didn't want anyone to know that [Mr. M.] was there. That if anybody came to the door he would go hide in the closet. [¶] And why did he sleep on the floor? Because he wasn't allowed in the bedroom. I think the

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[2] The details of C.B.'s hearsay statements were introduced through witnesses at the hearing rather than in the social study itself, giving mother the ability to cross-examine two of the three people to whom those statements were made. We note that there is no issue in this case concerning the adequacy of the notice mother received regarding the content of those statements. (See § 366.21, subd. (c) [requiring that report be filed and provided to parents at least 10 calendar days before any status review hearing].)

child was quite specific in the particulars that she described that sounded extremely credible to this court. I have to look at things in a total circumstance here. I have to consider her testimony and the circumstances when I put this in context. . . . [¶] And obviously with the mother here and J.B. having been untruthful previously I think they are still untruthful. I think [Mr. M.] has been in the home. I think he did exactly what C.B. said he did. I think he was there sleeping on the floor."

Having accepted as true C.B.'s statements that Mr. M. had been in mother's home while the children were visiting, the court could reasonably infer that mother had lied and had encouraged her oldest son J.B. to do the same, and that as a consequence, the younger children could not be safely returned to her care. Mother and Mr. M. had a history of domestic violence and she had at least once before exposed her children to him contrary to court order and the terms of her reunification plan. The order terminating reunification services and setting the case for a permanency planning hearing was supported by substantial evidence and was not an abuse of discretion. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705-706.)

DISPOSITION

The petition is denied. In the interests of justice, this opinion shall be made final as to this court immediately upon filing.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.

(A127757)